LIBRARY
SUPREME COURT, U.S.

No. 241

Office-Supreme Court, U.S.
FILED
JUL 2 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

JAMES B. CLOWER, DAN McWILLIAMS,
and CLYDE RECTOR, Intervenors,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and
TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,
ROANE ELECTRIC FURNACE DIVISION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

JAC CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee 37402
Counsel for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Constitutional Articles and Amendments Involved .. 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 5

Appendix:

Consent Decree of the United States Court of Appeals for the Sixth Circuit 6

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Writ of Error Coram Nobis 7

TABLE OF AUTHORITIES.

Cases.

Dunn v. Retail Clerks, 307 F. 2nd 289 4

N. L. R. B. vs. Tennessee Products & Chemical Corp., 329 F. 2nd 873 4

Constitution.

Constitution of the United States:

Art. III. Sec. 1 2

Art. III. Sec. 2 2

Amendment V 2

In the Supreme Court of the United States

OCTOBER TERM, 1964.

JAMES B. CLOWER, DAN McWILLIAMS, and CLYDE RECTOR, Intervenors,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and TENNESSEE PRODUCTS AND CHEMICAL CORPORATION, ROANE ELECTRIC FURNACE DIVISION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

The petitioners pray that a writ of certiorari issue to review the Order Denying Petition for Writ of Error Coram Nobis of the United States Court of Appeals for the Sixth Circuit entered April 1, 1964.

OPINIONS BELOW.

The consent decree entered by the Court of Appeals on April 8, 1963, is unreported. (See Appendix, page 6.) The Order Denying Petition for Writ of Error Coram Nobis is reported at 329 F. 2nd 873. (See Appendix, page 6.)

JURISDICTION.

The Order of the Court of Appeals for the Sixth Circuit was made and entered April 1, 1964, and a copy is set out in the Appendix hereto at page 7. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Can workers who were deprived of their jobs by a consent decree entered by the Court of Appeals, but who were not parties to the proceeding leading to the consent decree and had no notice thereof until after the decree was final, obtain relief from said decree by petition to said Court of Appeals?

CONSTITUTIONAL ARTICLES AND AMENDMENTS INVOLVED.

Article III, Section 1, of the Constitution of the United States reads in part:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *. (etc.)"

Article III, Section 2, of the Constitution of the United States reads in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * (etc.)"

Amendment V of the Constitution of the United States reads in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; (etc.)."

STATEMENT OF THE CASE.

During the course of a strike the Tennessee Products and Chemical Corporation, Roane Electric Furnace Division, fired the strikers. These strikers were represented by the United Steelworkers of America, AF[illegible]-CIO. After discharging the strikers, about two hundred replacements were hired, including the petitioners here.

The union filed with the N. L. R. B. a charge that Tennessee Products was guilty of an unfair labor practice in firing the strikers. The Trial Examiner found this true as to seventy-seven of the strikers (who were ordered rehired with back pay), but not as to the remainder, about three hundred and twenty. Without a hearing before the N. L. R. B., and without notice to the petitioners, or any opportunity to intervene, the dispute was settled by the entry of an agreed order providing for the reinstatement of all of the approximately four hundred discharged strikers, but without back pay. A decree of the Court of Appeals for the Sixth Circuit, entered by agreement, enforced this N. L. R. B. order. As a consequence, the two hundred replacements have been discharged.

An attempt to obtain relief in the State Chancery Court was held to be improper, since the Federal Government (NLRB) has preempted the field. The N. L. R. B. refused to entertain an unfair labor charge. When a petition was filed with the Court of Appeals, that Court held that it had no power to grant any relief.

The confused state of this case is exemplified by the fact that although James B. Clower, Dan McWilliams and Clyde Rector filed a Petition for Writ of Error Coram Nobis through their own counsel, and although this Court of Appeals considered same and disallowed it (See Appendix, pp. 7-9), they received no notice of the Court's action, were not listed in the Advance Sheets (See 329 F. 2nd 873), nor was there any listing of their attorney of record.

This petition for certiorari is directed to the refusal of the Court of Appeals to grant the Petition for Writ of Error Coram Nobis.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has held that it has authority to enter an enforcement order that affects these petitioners here, without notice to the petitioners and without opportunity to them to intervene or obtain relief, and has held that the sole remedy of the petitioners is through the NLRB. As stated in the order, *N. L. R. B. vs. Tennessee Products & Chemical Corp.*, 329 F. 2nd 873,

> "Congress has invested the N. L. R. B. and its agents with powers which, if withheld or abused, can visit serious and irreparable harm upon those who, under the scheme of the N. L. R. B. cannot obtain the help of judicial intervention. Foreclosed as we are from entrance by judicial writ into such a situation, we must leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction." (Repeated from *Dunn v. Retail Clerks*, 307 F. 2nd 289.)

This states clearly that the judicial power of the United States, instead of being vested in the courts, is vested in the N. L. R. B., but is "enforced" by the courts, not by the exercise of judicial discretion, but by lending the executive branch the name and influence of the judicial branch. This is never a proper use of the judicial power—the very essence of the judicial power is not enforcement, but weighing and deciding. It is particularly out of place here, where the approximately two hundred injured parties are being deprived of their jobs (a property right) without due process of law but with the sanction of the judiciary branch, while the sanctioning judiciary branch, like Pilate, washes its hands and says it has no power to judge.

CONCLUSION.

Some form of relief, somewhere, should be available to these petitioners.

Respectfully submitted,

JAC CHAMBLISS,
Counsel for Petitioners.

APPENDIX.

CONSENT DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THIS CAUSE was submitted upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, its officers, agents, successors and assigns on March 22, 1963, in a proceeding before the said Board numbered 10-CA-4850; upon the transcript of the record in said proceeding, certified and filed in this Court, and upon a stipulation providing for the entry of a consent decree of this Court enforcing the order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Sixth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby enforced; and that Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

/s/ CLIFFORD O'SULLIVAN,

Judge, United States Court of Appeals for the Sixth Circuit.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS.

Before O'SULLIVAN, PHILLIPS, and EDWARDS, Circuit Judges.

This matter is presented to us by a pleading entitled Petition for Writ of Error Coram Nobis. On April 8, 1963, this court, in this cause, entered a consent decree enforcing an order of the National Labor Relations Board. This order, entered pursuant to a settlement agreement between the National Labor Relations Board and respondent, Tennessee Products & Chemical Corporation, required, *inter alia*, that respondent rehire certain employees that it had discharged during the course of a strike, laying off, if necessary, employees who had replaced such discharged employees. The pleading before us is signed by three of such laid off employees. The relief sought is the vacation of our order of April 8, 1963, and the doing of "whatever is required by law and justice."

The petition avers the following facts as the grounds for relief. During the course of a strike respondent discharged the strikers. These employees were represented by United Steelworkers of America, AFL-CIO. Respondent company then began to replace the discharged strikers with other men, among which were petitioners.[1]

The AFL-CIO union, on behalf of the discharged strikers, thereupon filed with the NLRB a charge that respondent company was guilty of an unfair labor practice in discharging the strikers. A hearing was had and a Trial Examiner's report found that the company had violated the Act, by discharging some seventy-seven of the striking employees. The report held, however, that the remaining

---

[1] Petitioners assert that some 200 replacements were hired, and we assume that the named petitioners seek to assert the rights of all in that class.

strikers were not, during the work stoppage, engaged in a protected activity. The company was ordered to reinstate the seventy-seven. The Union and the Board's general counsel took exception to the Trial Examiner's report and contended that all strikers, a total of about four hundred, should be reinstated with back pay. Pending hearing before the Board, a settlement was reached whereby the company agreed to an order calling for the reinstatement of all the discharged Union members, laying off, if necessary, those that had replaced them. Our decree of April 8, 1963, enforced such order. We are asked coram nobis to vacate our decree.

While coram nobis, as a civil writ, was abolished by Rule 60(b) of the Federal Rules of Civil Procedure, it was permitted survival or revival in criminal practice by *United States v. Morgan*, 346 U. S. 502, 98 L. Ed. 248. Our function in litigation arising under the National Labor Relations Act is well defined by that Act, and we find nothing therein giving us the right to entertain original applications for writs of error coram nobis. We doubt, too, whether in such matters we have any general equity powers.

Apart, however, from procedural labels, we do not think that the present address to us calls for or permits action on our part. We need not decide whether the present petitioners would or should have been allowed to intervene in the above-entitled cause, had a request therefor been made to the NLRB or to us before the matter was finalized by our decree. After our decree, one or more of the present petitioners did file with the appropriate Regional Director of the NLRB a charge asserting that what was accomplished by the carrying out of the settlement, approved and enforced by our decree, and which resulted in the layoff of some or all of those who replaced the reinstated strikers, was an unfair labor practice. The Regional

Director of the NLRB, as well as its general counsel, refused to issue a complaint. In the case of *Dunn v. Retail Clerks*, 307 F. (2d) 285 (CA 6, 1962), we held that neither a District Court nor ourselves have power, by mandamus or otherwise, to command the NLRB to issue such a complaint. Such, too, was the holding in *Hourihan v. NLRB*, 201 F. (2d) 187 (CA.—D. C., 1952), cert. den. 346 U. S. 930, and *Bandlow v. Rothman*, 278 F. (2d) 866 (CA.—D. C., 1960), cert. den. 364 U. S. 909. As we stated in *Dunn v. Retail Clerks, supra*:

> "Congress has invested the N. L. R. B. and its agents with powers which, if withheld or abused, can visit serious and irreparable harm upon those who, under the scheme of the N. L. R. A., cannot obtain the help of judicial intervention. Foreclosed as we are from entrance by judicial writ into such a situation, we must leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction." (307 F. (2d) 289.)

The petition before us also infers that when the petitioners were hired as replacements for the strikers, promises were made which might give them some contractual rights to continued employment. But, whatever the status of petitioners' alleged contractual rights, this court is not the forum in which to vindicate them. Our function is fundamentally appellate in NLRB matters. It has been held that, since administrative bodies are created to serve the public interest, they are not a proper forum for the litigation of private contractual rights. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 268, 84 L. Ed. 738, 743 (1939).

The petition now before us is denied.

Approved for entry.

CLIFFORD O'SULLIVAN,
United States Circuit Judge.